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Chios Carmody

The University of Western Ontario

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Citation of this paper:

Chios Carmody, "Fairness in WTO Law" unpublished manuscript presented at University College London Symposium on International Economic Law (Nov. 2013)

FAIRNESS IN WTO LAW

By Chios Carmody
Associate Professor & Canadian National Director
Canada-United States Law Institute
Faculty of Law
University of Western Ontario
London, Ontario, Canada N6A 3K7
email: ccarmody@uwo.ca

Nov. 10, 2013

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ABSTRACT: The idea of fairness is a recurrent one in international economic law and relations. By and large, however, commentators have failed to provide a structured understanding for this vital concept or explain its reflection in legal rules. This article proposes a theory of fairness as part of a broader theory of justice, suggesting that fairness is a part of justice, but not the whole of it. Rather, justice may be thought of as a combination of equality plus fairness (i.e. justice = equality + fairness), with the proviso that in any complex system of legal rules, equality must be greater than, or conceptually prior to, fairness (i.e. equality > fairness). In the latter half of this article a look is taken at how these conceptual relationships are expressed in the law of the World Trade Organization.

FAIRNESS IN WTO LAW

By Chios Carmody¹

1. Introduction
2. The Concept and Role of Fairness
3. Fairness in WTO Law
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1. Introduction

*. What is fair, and what role does fairness play in human affairs? These are substantial questions, questions that evade easy answers. We often say that something is “fair” in the sense of it being fitting or right, but how this idea is to be distinguished from other proximate ideas like equality or justice is unclear. Moreover, there seems to be an innate sense among human beings that the arrangements and communities we live in – including the international community – should be “fair”, but again, what exactly this aspiration means and how it is to be reconciled with notions of fittingness or rightness are uncertain.

*. A very visible manifestation of these sentiments occurred in the fall of 2011 when protests organized under the banner of the Occupy Movement erupted in cities across the United States and around the world. The protesters demands were many and varied, but in the main they centered on the documented growth in income and social inequality during a time of uneven economic performance and intensifying competition.² In one way or another, the protesters’ demands raised issues of fairness. Is it fair for a small minority in many countries to reap most of the benefits of globalization?³ Have continuing waves of privatization over the last few decades created ‘pools’ of privilege that hinder broad social mobility? No sooner had Occupy raised these difficult questions than it seemed strangely to loose steam and fade away. Nevertheless, its record was a stark reminder that fairness is a perennial issue, one we remain keenly interested in.

*. Yet domestic politics and law are not the only venues for fairness queries and claims. Issues of fairness are constantly being raised in international law, and in international economic relations in particular. During the 1960s, for instance, a “New International Economic Order” (NIEO) became a rallying cry for developing country governments and people who sought a more equitable division of the world’s resources, industry and wealth. The principal point of their advocacy was the perception that the then emerging system of global capitalism was unfair.⁴ Likewise, during the 1980s and 1990s a number of governments and commentators criticized the “Washington Consensus”, a set of policy

¹ Associate Professor & Canadian National Director, Canada-United States Law Institute, Faculty of Law, University of Western Ontario, London, Ontario, Canada N6A 3K7. email: ccarmody@uwo.ca. I would like to thank Associate Dean Erika Chamberlain and the University of Western Ontario Faculty Research Development Fund for making it possible to present this paper at the UCL-UNSW Socio-Legal and Theoretical Aspects of International Economic Law Conference, University College London Faculty of Laws, London, England Nov. 14, 2013..

² For a summary of the Movement’s themes and views see Janet Byrne (ed.), *The Occupy Handbook* (2012).

³ In the United States, for instance, incomes of the top 1 percent of income earners grew 3.9 percent a year, capturing more than half of the overall economic growth experienced between 1993 and 2008. See Facundo Alvaredo, “Inequality over the Past Century”, 48:3 *Finance & Development* 28 (Sept. 2011). *The Economist* has observed, “...within many countries income gaps have widened. More than two-third of the world’s people live in countries where income disparities have arisen since 1980, often to a startling degree. In America the share of national income going to the top 0.01% (some 16,000 families) has risen from just over 1% in 1980 to almost 5% now – an even bigger slice than the top 0.01% got in the Gilded Age.” “True Progressivism” *The Economist* (Oct. 13, 2012).

⁴ Alexandra Diehl observes that “a new form of equity doctrine evolved when developing countries started to demand an NIEO. The call for this new economic order ... took explicit form in three 1974 United Nations General Assembly resolutions which all contain references to equity ... [The resolutions] all reflect[] a common understanding to define equity as a form of distributive justice – in other words an element of fairness.” Alexandra Diehl, *The Core Standard of International Investment Protection: Fair and Equitable Treatment*, pp. 318-319 (2012) [hereinafter *Diehl*].

prescriptions on privatization, debt reduction and public sector restraint.⁵ A key complaint was that the prescriptions were unrealistic and unfair. And in the late 2000s several Latin American countries withdrew from the compulsory jurisdiction of the International Centre for the Settlement of Investment Disputes (ICSID), voicing the common concern that ICSID procedures for investment arbitration were one-sided and unfair.⁶

*. Despite these claims, the question of the content of fairness and what role it plays in both domestic and international law remains surprisingly open. Apart from underlying themes of inequality and subjectivity, few of the fairness claims outlined above appear to display a common element. Fairness seems to be mostly an intuitive matter: we know it when we see it. Not surprisingly, thinking about fairness in international law and international economic law remains muddled and confused.⁷

*. In 1995, for instance, Thomas Franck proposed that the central question in international law is whether or not international law is fair.⁸ Franck advanced this question without explaining why, as a preliminary matter, fairness - as opposed to equality or justice or any other value ordinarily spoken about in connection with international law - should merit pre-eminent consideration. After all, the traditional inquiry in law is not fairness, but justice, as is implicit from the appellation of the pre-eminent tribunal of international law, the International Court of *Justice*. Similarly, in 2000 Steven Suranovic observed that “[t]he literature on fairness is diverse, multi-disciplinary, and often impenetrable”, but then seemed to add to that impenetrability by positing several different types of fairness.⁹ Suranovic concluded that while his scheme of classification helped to identify “the fundamental basis for normative arguments”, the inherent subjectivity of fairness meant “reasonable fairness principles will conflict when applied to a particular policy action”, leading to what he termed “a kind of ‘impossibility theorem’ ... that there is no way to determine a set of objectively fair

⁵ The term Washington Consensus was coined in 1989 to describe a set of ten relatively specific economic policy prescriptions that he considered constituted the “standard” reform package promoted for crisis-wracked developing countries during the 1980s by Washington, D.C.-based institutions such as the International Monetary Fund, the World Bank and the U.S. Treasury Department. The prescriptions encompassed policies in such areas as macroeconomic stabilization, economic opening with respect to both trade and investment, and the expansion of market forces within the domestic economy. The term Washington Consensus has come to be used fairly widely in a second, broader sense, to refer to a more general orientation towards a strongly market-based approach to economic development.

⁶ When the number of ICSID investment claims began to grow during the late 1990s, concern about the fairness and integrity of ICSID’s dispute settlement system began to increase. In May 2007 Bolivia withdrew from the Washington Convention and was followed by Ecuador in July 2009. In addition, in 2008 the Venezuelan Supreme Court issued an opinion limiting the extent of the country’s consent to submit to ICSID jurisdiction. All of the announcements of withdrawal or modification of consent echo traditional criticisms of the investor-state system of protection, but they can also be linked to recent waves of nationalization and expropriation undertaken in the region. Arguments raised by Latin American governments against ICSID are generally that ICSID awards are not subject to appeal, that the majority of ICSID disputes have been decided in favour of investors and therefore betray a lack of neutrality and impartiality, that claims under the treaty can only be launched by private investors (as opposed to states), and that the cost of arbitration is high. Debate now centers on the legal effect of the withdrawals: see Ignacio Vincentelli, “The Uncertain Future of ICSID in Latin America”, Electronic copy available at <http://ssrn.com/abstract=1348016> (2008); Antonios Tzanakopoulos, “Denunciation of the ICSID Convention under the General International Law of Treaties”, Electronic copy available at <http://ssrn.com/abstract=1735495> (2010) reprinted in Rainer Hofmann & Christian Tams (eds), *International Investment Law and General International Law* 75 (2011).

⁷ For an index of recent literature on fairness see Andrew Brown & Robert Stern, “Concepts of Fairness in the Global Trading System” 12:3 *Pacific Econ. Rev.* 293, 318 (2007) [hereinafter *Brown & Stern*]. See also Nicholas Rescher, *Fairness: theory and practice of distributive justice* (1966).

⁸ Franck observed, “Like any maturing legal system, international law has entered into its post-ontological era ... The questions to which the international lawyer must now be prepared to respond to ... are different from the traditional inquiry: whether international law is law. Instead, we are now asked: is international law effective? Is it enforceable? Is it understood? And, the most important question: Is international law fair?” Thomas Franck, *Fairness in International Law and Institutions* 6 (1995). Many commentators subsequently picked up on this theme of fairness identified by Franck. For a critical appraisal see John Tasioulas, “International Law and the Limits of Fairness” 13:4 *Eur. J. Int’l L.* 993 (2002).

⁹ Suranovic identifies three types of equality fairness (non-discrimination fairness, distributional fairness, Golden-Rule fairness) and four types of reciprocity fairness (positive reciprocity fairness, negative reciprocity fairness, privacy fairness and maximum benefit fairness). However, he observes that “The concept itself overlaps with many other normative principles such as justice, equity, law and even morality. As such, one cannot simply pick up a book or article and quickly discover what fairness means or how to distinguish between the various normative principles. And yet, at the same time, everyone seems to have an inherent sense of what fairness is.” Steven Suranovic, “A Positive Analysis of Fairness with Applications to International Trade” 23:3 *The World Economy* 283 (2000).

principles.”¹⁰ Likewise in 2006 Amrita Narlikar, writing about the fairness of international trade relations conducted under the auspices of the World Trade Organization (WTO), interpreted fairness to mean legitimacy of process and equity of outcomes. She noted that there have been shifts in the attitudes of developing countries towards the institutional balance struck between these two concepts in the organization.¹¹ Like Franck however, she did not explain why fairness is important as a substantive matter nor why it might be of concern to developing countries in the WTO. And in a contribution on the same subject by Andrew Brown and Robert Stern published in 2007, the authors concluded with the cautionary observation that “[a]ny attempt to define fairness in global trade relations should teach humility ... there is still no conclusive and incontrovertible way of assessing fairness.”¹²

*. These many contributions and the myriad ways in which they approach the subject demonstrate that there remains considerable uncertainty and confusion about the content and role of fairness. To develop a more systematic understanding, we appear to need a theory. A theory is a “system of ideas”¹³, with the emphasis being on the “system”, or set of relationships, regularly exhibited between those ideas.¹⁴

*. In this article I develop a theory of fairness as part of a larger theory of justice. I suggest that fairness is a part of justice, but not the whole of it. Instead, drawing on recent insights from biology and evolutionary psychology, I suggest that rules involving fairness are a reflection of the fact that fairness is important to the formation of groups. A commitment to fairness is a community’s pledge that the community will be attentive to an individual’s particular concerns, needs or wants.¹⁵ In effect, the pledge is one of ‘appropriateness’ that helps to secure an individual’s participation in communal arrangements. Biologists and evolutionary psychologists have inferred from this that the pledge facilitates the division of labour and therefore contributes to the tremendous degree of sophistication observed in today’s global economy.¹⁶

*. I go on to show how these ideas about fairness are confirmed and displayed in the law of the World Trade Organization (WTO). The WTO is an international organization whose chief value is equality, mainly projected through the promotion of the equally competitive conditions between foreign and domestic goods, services and intellectual property. This preoccupation can be understood as an extension of the traditional principle of equality under international law.¹⁷ At the same time, however, WTO rules manifest a concern with fairness in selected instances – in preambular mention of fairness, in references to the concept in dispute settlement, in the case of proportionality analysis involving the exercise of WTO rights, and in WTO retaliation. These varied indications tend to confirm that fairness is a supplementary value, a value that assists in reinforcing and attaining equality, and ultimately, in confirming the ‘community’ of the WTO.

¹⁰ Ibid., 304-306.

¹¹ Amrita Narlikar, “Fairness in International Trade Negotiations” 29 *The World Economy* 1005 (2006).

¹² See Brown & Stern, *supra*, note 7, 316 (2007).

¹³ S.v. “Theory”, *Shorter Oxford English Dictionary* (5th ed.) 3236 (2002).

¹⁴ For a treatment of systems and systems theory see Donella Meadows, *Thinking in Systems* (2008). For an attempt to define the elements of a legal system see Joseph Raz, *The Concept of a Legal System* (1980). Philip Allott has written, “The transforming capacity of a system transforms the transformed materials so that they become new or different structures and systems through the functioning of the system.” Philip Allott, *Eunomia* 147-148 (1990) [hereinafter Allott].

¹⁵ This is my abstraction of Joseph Henrich’s definition of fairness as “whatever combination of motivations and expectations yields *more equal divisions*.” Joseph Henrich et al., “Markets, Religion, Community Size, and the Evolution of Fairness and Punishment”, 327 *Science* 1483 (19 March 2010) [emphasis added] [hereinafter Henrich].

¹⁶ “The efficiency of market exchange involving infrequent or anonymous interactions improves with an increasingly shared set of motivations and expectations related to trust, *fairness* and cooperation.” Ibid. at 1480 [emphasis added].

¹⁷ Jennings and Watts observe that “[n]otwithstanding such force as the general principle of non-discrimination might have [in international law], a state is not normally prevented from extending to another state particularly favourable treatment which it refrains from extending to third states.” Robert Jennings & Arthur Watts, *Oppenheim’s International Law* (9th ed.) 1326 (1996). Thus, while “[t]he principle of juridical equality is established as one of the basic principles of international law”, countries are free to treat each other differently. Ibid., p. 340.

*. What are the implications of such an analysis? First, this preliminary set of ideas allows us to locate fairness within a larger vision, or theory, of justice. Fairness is a secondary value that aids in the attainment of equality by promoting inclusiveness. Second, discernible in the outline of WTO law is a project of great rationalism. Fairness references within it provide some idea of what role fairness might play as a value in the legal system by allowing for ‘appropriate’ adjustments necessary to sustain the larger community. Third, the analysis reveals how fairness is a particular value as opposed to a more generalized one. In a highly developed global economy, it should be exceptional – as indeed the experience of WTO law tends to confirm. Finally, all of these points furnish a better idea of what fairness is as a matter of definition. As such, we can leave behind some of fairness’ famous vagueness and imprecision in favour of a meaning that stresses its role in ‘appropriateness’ and inclusivity. With the example of WTO law, we can put forward a defensible definition of fairness, one that is consistent with many – though admittedly not all – its usages.

*. Following this Introduction, therefore, Part 2 more fully develops a theory of fairness as part of a larger communitarian theory of justice. Part 3 goes on to examine how these ideas are exhibited and confirmed by practice in WTO law. As will be seen, fairness considerations are a reflection of the attention paid by a legal system to “the individuality of the law”.¹⁸ Part 4 provides some concluding remarks about the relevance of fairness for international economic relations and for law in general.

2. The Concept and Role of Fairness

*. The idea of fairness is elusive. As Americo Beviglia Zampetti observed in 2006:

Fairness is a complex idea with a long history. As Woods put it, ‘very few ideas are very new’, and fairness is certainly not one of them. There is no accepted, uniform, and commonly shared definition of fairness. The notion is strongly associated with such ideas as equality, proportionality, reciprocity, equity, and justice, only to mention other terms that have found currency in the trade policy discourse. These concepts are entangled and their usage across disciplines and policy areas is far from univocal. But fairness, like justice, addresses issues that are fundamental to the social life of individuals as well as to nations.¹⁹

A similar lack of clarity about fairness is observed in international economic relations. Commentators often fail to provide a definition or simply assume its importance without explaining why it might be so fundamental. Given these qualifications, it is useful at the outset to examine the concept and role of fairness.

*. In common English usage what is “fair” is considered to be fitting or appropriate to the circumstances.²⁰ We say, for example, that a particular transaction is fair, meaning that it is suitable for all concerned. This is not, however, the same as saying that it is economically optimal. A fair transaction will simply be unobjectionable.

*. This set of preliminary observations provides some initial insight about the content of fairness. First, fairness is a rough measure of what is socially acceptable. It may not satisfy every interest fully, but it is enough to preserve the relationships involved. Second, the use of fairness suggests that it is

¹⁸ Philip Allott, *Eunomia* 160 (1990).

¹⁹ Americo Beviglia Zampetti, *Fairness in the World Economy* 26 (2006). Similarly, Steven Suranovic has written, “The concept itself overlaps with many other normative principles such as justice, equity, law and even morality. As such, one cannot simply pick up a book or article and quickly discover what fairness means or how to distinguish between the various normative principles. And yet, at the same time, everyone seems to have an inherent sense of what fairness is.” Steven Suranovic, “A Positive Analysis of Fairness with Applications to International Trade” 23(3) *The World Economy* 283 (2000).

²⁰ “Fair ... [f]ree from bias, fraud or injustice; equitable, legitimate.” J.A. Simpson & E.S.C. Weiner, *The Oxford English Dictionary – Vol. V* (2nd ed.) 671 (1989). Legal dictionaries offer a slightly different definitions. “Fair means ... 1. impartial; just; equitable; disinterested; 2. Free from bias or prejudice ...”. *Blacks Law Dictionary* (9th ed.) 674 (Brian Garner, ed.); “Fair means ... reasonable”, Daphne Dukelow, *The Dictionary of Canadian Law* (4th ed.) 474 (2011).

something which applies in particular situations as contrasted with general ones. Fairness is something that humans are chiefly concerned with as an attribute of their continuing relationships. Instinct tells us that it would make a poor rule for human behaviour as a whole. Third, fairness is *not* equality (i.e. fairness \neq equality). The plain difference in terminology emphasizes the fact that there is a clear distinction between the two concepts.²¹ Instead, fairness can be thought of as *inequality*, although as we will see, it is inequality of a special type.

*. These preliminary observations invite controversy and need to be tested against a range of usages and practice in order to be confirmed. Research from science can help. Since 2000 there has been considerable scientific research into the origins and nature of fairness.²² Both biologists and evolutionary psychologists have sought to determine the distinctive contribution of fairness to human relations.

*. The research reveals that fairness is a uniquely human trait. It is not something that is observed in our closest genetic relative, the chimpanzee.²³ Looking at the way species have evolved differently, biologists and evolutionary psychologists have suggested that fairness is vital to human interaction, and in particular, to the formation of groups. These are not just small-scale groups, such as families, kinship assemblies and associations, where individuals are likely to know each other intimately and where, in particular, they are likely to discount or revalue their transactions in the expectation of a continuing relationship. It also includes larger, more complex forms of human affiliation where personal connections are effectively lost and where, as Joseph Henrich has recently pointed out, substitutive social mechanisms such as religion, education and esteem for altruistic behaviour all contribute to reinforce the wider communal sense of fairness.²⁴

*. If these findings are accepted, then it becomes apparent that fairness is important both at an individual and a communal level because it is part of a successful evolutionary strategy. In essence, fairness has allowed complex human communities to arise. Many transactions we engage in as humans require us to forego the satisfaction of immediate reciprocation. The guarantee of fairness in these situations – not exact reciprocation, but reciprocation of an approximate type, usually over time – encourages the maintenance and intensification of relationships by affording individuals the security of knowing that at least some their interests will be taken into account.

*. This conclusion, in turn, yields two further observations.²⁵ The first is that a degree of fairness implies a community. Fairness is most often at issue among those who foresee a continuing relationship, or set of relationships, that take the form of a community.²⁶ An examination of antonyms

²¹ Confirmation of this point comes from common definitions, which do not always equate fairness with equality. Instead, they tend to suggest that fairness plays a supplementary role in *attaining* equality. For example, Ioana Tudor observes, “the common understanding given to fair treatment is that of right and reasonable treatment that sometimes *may achieve equality* between the parties, although this is not always the case.” Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* 126 (2008) (emphasis added) [hereinafter *Tudor*]. Joseph Henrich refers to behavioural fairness as “whatever combination of motivations and expectations yields *more equal divisions*”. Henrich, *supra* note 15 at 1483 (emphasis added). “Fairness relates to (but does not identify with) the propriety of distribution between burdens and benefits. Just outcomes are generally those that flow from fair processes. A ‘fair trade’ (as a ‘fair fight’) is one conducted under *roughly equal conditions*.” Americo Beviglia Zampetti, *Fairness in the World Economy* 27 (2003).

²² Ernst Fehr & Simon Gächter, “Fairness and Retaliation: The Economics of Reciprocity” 14:3 *Journal of Economic Perspectives* 159 (Summer 2000); see Henrich, *supra* note 15. See supporting references in T.C. Burnham et al., 27 *Anal. Kritik* 113 (2005); M.A. Nowak et al, 289 *Science* 1773 (2000). See also Karla Hoff, “Fairness in Modern Society” 327 *Science* 1467-68 (19 Mar. 2010); George Akerlof & Robert Schiller, *Animal Spirits* pp. 19-26 (2010).

²³ “Evolution: Patience, Fairness and the Human Condition” 950 *The Economist* 67 (6 Oct. 2007).

²⁴ See Henrich, *supra*, note 15.

²⁵ On the relevance of community see Michael Sandel, *Law and the Limits of Liberalism* 172-75 (1998). For a look at what makes a community see Peter Block, *Community: the structure of belonging* (2009).

²⁶ Thomas Franck defined a community as follows: “A community is based, first, on a common, conscious system of reciprocity between its constituents and this system of reciprocity conduces to a fairness dialogue. This is because a perception of the fairness of any particular rule depends, in major part, on its implicit promise to treat like with like. In order to achieve the expectations that the rule in any one instance will also be the rule in other comparable instances, there must be an underlying assumption of an ongoing, structured relationship between a set of actors: in other words, a community.” Thomas Franck, *Fairness in International Law and Institutions* 10 (1995).

supports this view. What is “unfair” is socially undesirable. Its pejorative connotation infers that it is something that most people would not choose to be involved with.

*. A second observation has to do with the convergence between the view of fairness put forward above and recent developments in economics. These suggest that individuals are not purely rational maximizers. In other words, they do *not* seek to satisfy their own immediate interests, at least not all the time, as economists have long assumed.²⁷ Rather, the behaviour of individuals will be calculated to uphold the relationships that are vital to their long-term well-being, a fact which may demand significant discounting or revaluation as the circumstances require and which naturally gives rise to considerations of fairness.²⁸

*. But if fairness is so important and if it has played such a critical role in our evolution as a species, why are communities – including the international community – not *entirely* fairness-based. Why is the central question we are so often confronted with in international law not the one that Franck posed – “is international law fair?”²⁹ – but a different one, “is international law *just*?” Fairness cannot serve as a basis for *all* law, otherwise the law risks becoming purely political.³⁰ Another reason is that the doing of fairness is variable and therefore tends to erode stability and predictability that are the principal purposes of the law.³¹ In addition, no community will have the luxury of meeting all claims to fairness. This is because individuals are endlessly different and while sharing the common fact of their humanness, they constantly confront different circumstances. For this reason, not all interests in the form of human needs, wants or desires can be satisfied. Finally, the ‘doing’ of fairness imposes a communal ‘cost’ in terms of different logic, rules and requirements. It is not free. Decision-makers must therefore weigh the expense of ‘doing’ fairness in a particular situation against its wider value in reinforcing the sense of communal affiliation.³²

²⁷ For re-evaluations of econometric analysis of law see Richard Posner, *The Failure of Capitalism* (2009); Richard Posner, *The Crisis of Capitalist Democracy* (2010). Nicola De Luca, “Unequal Treatment and Shareholders’ Welfare Growth: ‘Fairness’ v. ‘Precise Equality’” 34:3 *Delaware J. Corp. L.* (2009) (arguing that a strong or rather mechanical equal treatment rule in share repurchases, distributions in kind, or capital reductions is not efficient; an economic analysis of the law shows that disparate treatment of shareholders may increase shareholders’ overall welfare).

²⁸ Henry Orenstein, “Asymmetrical Reciprocity: A Contribution to the Theory of Political Legitimacy” 21:1 *Current Anthropology* 69 (1980). See also René Provost, “Asymmetrical Reciprocity and Compliance with the Laws of War” in Benjamin Perrin (ed.), *Modern Warfare: Armed Groups, Private Militaries, Humanitarian Organizations, and the Law* 17 (2012).

²⁹ Thomas Franck, *Fairness in International Law and Institutions* 7 (1995).

³⁰ Several commentators have examined the discontinuity between fairness and justice. Herbert Hart made the following observation, “The distinctive features of justice and their special connection with law begin to emerge if it is observed that most of the criticisms made in terms of just and unjust could almost equally well be conveyed by the words ‘fair’ and ‘unfair’. Fairness is plainly not coextensive with morality in general; references to it are mainly relevant in two situations in social life. One is when we are concerned not with a single individual’s conduct but with the way in which classes of individuals are treated, when some burden or benefit falls to be distributed among them. Hence what is typically fair or unfair is a ‘share’. The second situation is when some injury has been done and compensation or redress is claimed.” H.L.A. Hart, *The Concept of Law* (2nd ed.) 158 (1997). “Conflicts among ideals are common in politics. Even if we rejected integrity and based our political activity only on fairness, justice, and procedural due process, we would find the first two virtues sometimes pulling in the opposite direction. Some philosophers deny the possibility of any fundamental conflict between justice and fairness because they believe that one of these virtues in the end derives from the other. Some say that justice has no meaning apart from fairness, that in politics, as in roulette, whatever happens through fair procedures is just. That is the extreme of the idea called justice as fairness. Others think that the only test of fairness in politics is the test of result, that no procedure is fair unless it is likely to produce political decisions that meet some independent test of justice. That is the opposite extreme, of fairness as justice. Most political philosophers – and I think most people – take the intermediate view that fairness and justice are to some degree independent of one another, so that fair institutions sometimes produce unjust decisions and unfair institutions just ones.” Ronald Dworkin, *Law’s Empire* 177 (1986).

³¹ See generally F.A. Hayek, *The Constitution of Liberty*, ch. 14-15 (1960). Stability and predictability have also been identified as the principal purpose of WTO law, where panel references have been made to the security and predictability of WTO concessions as the “basic”, “main” and “central” purpose of the treaty: “We agree with the Panel that the security and predictability of “the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade” is an object and purpose of the *WTO Agreement*, generally, as well as of the GATT 1994.” *EC – Computer Equipment*, WT/DS62, 67, 68/AB/R, para. 82 (5 June 1998), see also *EC – Selected Customs Matters*, WT/DS315/R, para. 6.34 and see comments at para. 7.431 (16 June 2006).

³² Herbert Hart referred to this idea of a limit to the “cost” of enforcement in the following terms: “In civil cases, a similar conflict between justice and the general good is resolved in favour of the latter, when the law provides no remedy for some moral wrong because to enforce compensation in such cases might involve great difficulties of proof or overburden the courts, or unduly hamper enterprise. There is a limit to the amount of law enforcement which any society can afford, even when a moral wrong has been done.” H.L.A. Hart, *The Concept of Law* (2nd ed.), p. 166 (1997). There are, of course, some troubling conclusions to the theory of justice and fairness put forward here. A community’s resources will be devoted to satisfying certain claims at the expense of others, something

*. The limits of fairness suggest that in a complex community – a community where the majority of transactions are impersonal, that is, conducted with strangers with whom we have no regular relationship – another value becomes important. This is the value of equality. Still, equality presents challenges of its own largely because it is impossible for the operation of justice to be completely identical, and in fact, most people in most situations will be content to provide somewhat less or more than they have received in recognition of an ongoing relationship requiring reciprocation in future. Hence, the doing of equality - and by extension justice - in specific instances is not the same as identity (i.e. equality \neq identity) but more akin to fairness.

*. The conclusions above can be distilled into a set of relationships that may be expressed as follows:

$$\text{Justice} = \text{Equality} + \text{Fairness}$$

This equation has the advantage of replicating the definition of justice given by a number of legal theorists.³³ The biological and evolutionary theory set out above, however, also infers that this basic relationship is accompanied by an important proviso:

$$\text{Equality} > \text{Fairness}$$

*. The proviso reflects the fact that in any complex set of rules equality must take precedence over fairness to account for the priority it assumes in human thinking.³⁴ Fairness will involve reciprocation that depends on what is “appropriate” to sustain the relationship in question.

*. The arrangement above finds reflection in international law - something which is not surprising given my earlier point that equality and fairness are values of both individual *and* communal relations. Perhaps the best evidence is found in the work of the International Law Commission (ILC) on the Draft Articles on State Responsibility (DASR).³⁵ The DASR specify that a state responsible for an internationally wrongful act is under an obligation to *cease* its wrongdoing (DASR Art. 30) and to make *reparation* for the injury caused (DASR Art. 31). From these twin requirements a framework for thinking about international justice is discernible. In international law it may be said that there is an obligation to provide an *equal* expectation of lawful behaviour going forward (cessation) and an obligation to *fairly* repair the injury sustained in the past (reparation). Thus, looking at the two consequences of state responsibility, the same basic values of justice (i.e. Equality + Fairness) become evident in the manner outlined above. At the same time, the ILC’s observation that cessation “is ... relevant to *all* wrongful acts extending in time “regardless of whether the conduct of a State is an action or omission.””³⁶, that it “is not subject to limitations relating to proportionality”³⁷ and the

which inevitably gives rise to the conclusion that any community will be, in some way, *residually unjust*. In this respect, two further observations can be made. First, as mentioned, fairness is just, but not all justice is fair. The explanation for this paradox lies in the fact that in a sustainable community justice will be composed of equality and fairness, but there will be some instances where what is just is *not* fair. This ‘residual’ unfairness may be a stimulus to communal reform, re-organization or, in certain circumstances, to a radical reformation of the community in the form of revolution, secession or dismemberment. A second conclusion is that communal arrangements reflective of justice will be oriented in a certain way: *towards* equality and *away from* fairness. This means that equality will have a certain idealistic and attractive character.

³³ Sanne Taekema observes that “[t]he combination of fairness and equality at the core of the concept of justice is also propagated by Neil MacCormick (1978, 73). Fairness as the core of justice is proposed e.g., by David Miller (1976). Justice as equal treatment can also be found in – apart from Radbruch (1932, 278) Hart (1994, 159), Harris (1996, 171), and Aristotle (1934 *Nicomachean Ethics*).” Sanne Taekema, *The Concept of Ideals in Legal Theory*, 192, n. 31 (2003).

³⁴ The proviso may be said to be succeeded by two further provisos: 1. Equality \neq Fairness, that is, that equality and fairness are conceptually distinct from each other, with fairness playing the secondary and supplemental role of reinforcing the basic equality of members of the community, 2. Equality \neq Identity, that is, that the ‘doing’ of equality in any single instance will *not* amount to identity due to the fact that most reciprocation is asynchronous and asymmetric, and hence more akin to fairness. I do not have space to fully explore these additional points here.

³⁵ James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (2002).

³⁶ *Ibid.*, 196.

³⁷ *Ibid.*, 197.

conditionality of the various forms of reparation in DASR Arts. 34-37³⁸ all infer that cessation, and equality, assume a certain priority in international law. This, in turn, suggests that international justice displays the same proviso (i.e. Equality > Fairness).

*. The structure of the proviso, Equality > Fairness, raises the critical question, why would parties agree to deal with each other in the first place if they knew they were going to get back *less* than they put in? Because the proviso is one which applies in situations of breach, an exceptional event, as opposed to in the normal course. In the normal course parties would be expected to put forward as much as they expected to get back, and perhaps something more, in the expectation of a continuing relationship. The fact that they might get back less than an equal share in breach would tacitly encourage them to fulfill their obligations and serve as an incentive to disputing parties to settle their differences.

*. The theory of justice just put forward infers that equality is an outgrowth of an increasingly impersonal community, yet there have been many impersonal communities before equality came to be a preoccupation in political thinking around the time of the English, American and French Revolutions. Hence, the theory of justice that I am positing is questionable. I recognize this objection, but I also maintain that the theory must be understood in light of evolving conceptions of equality and fairness which give an ever greater force to the egalitarian impulse and tend to reinforce the proviso (i.e. Equality > Fairness). Much of the last three hundred years in human history has been devoted to the sweeping away of political structures that, in their earliest phases, must have been based on fairness and replacing them with structures based on equality. This movement is a manifestation of the ever more abstract and complex communities we live in, including the international community.³⁹

*. To summarize, I take a particular, subordinate view of fairness in law. Many commentators have had difficulty in defining and identifying what fairness involves, a difficulty I would attribute to the variability of fairness as well as to layers of terminologic confusion that encrust its meaning. Fairness is a subjective value and subjectivity frequently obscures its definition.

*. At the same time, fairness also possesses certain objective attributes. I see it playing a certain role in human relations and as part of the idea of justice. Fairness is “appropriateness”, or in other words, what is appropriate to sustain relationships and reinforce equal membership in a community. Fairness may amount coincidentally to equality, but it is more likely to be unequal in some degree, an inequality that, paradoxically perhaps, helps to maintain the notional equality of all members of a community. It might be termed “the justice of individual circumstances” and is to be contrasted with

³⁸ Reparation is further qualified by the sequential way in which the various forms of reparation are structured, as set out in DASR Arts. 34:

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination ...

Restitution is identified in DASR Art. 35 and aimed at re-establishing “the situation which existed before the wrongful act is committed” provided that restitution “is not materially impossible” and that it “does not involve a burden out of all proportion to the benefit deriving from the restitution instead of compensation”. Compensation is identified in DASR Art. 36 and is said to encompass “an obligation to compensate for damage ... insofar as such damage is not made good by restitution”. Compensation is described as covering “any financially assessable damage including loss of profits insofar as it is established.” Finally, satisfaction is identified in DASR Art. 37 as being given for injury “insofar as it cannot be made good by restitution or compensation.” Satisfaction may consist of “an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality”, but “[it] shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.”

³⁹ Whereas Charles de Visscher observed as late as 1968 that there was no such thing as an “international community” (see Charles de Visscher, *Theory and Reality in Public International Law* (tr. by P.E. Corbett) 88 (1968)), more recent commentators have been more affirmative of such an idea. Thus, Thomas Franck has written of “an *emerging sense* of global community.” Thomas Franck, *Fairness in International Law* 11 (1995). There are numerous references to the “international community” in U.N. resolutions. For continuing debate about the concept of an “international community” see Alan Boyle & Christine Chinkin, *The Making of International Law* 17 (2007) (“the concept of *international community* is an artificial construct and both its constitution and the content of its values derived therefrom are contested”) [emphasis added]; David Bederman, *The Spirit of International Law* 49 (2006) (“if anything can be derived from the discussion of the basis of international obligation and the formal sources of international legal rules, it is that international law is intended to serve the needs of a *unique community*: national and transnational entities”) [emphasis added].

“the justice of general circumstances” taking the form of equality.

3. Fairness in WTO Law

*. In this Part, I illustrate how the above ideas of fairness display in WTO law. What I am interested in demonstrating is the way that fairness considerations are a function of a specific ‘community’ of law in question. This is accomplished through an examination of preambular and textual references to “fairness” in the WTO Agreement as well as to mention of the topic in WTO dispute settlement, in the exercise of rights, and its consideration in cases involving the suspension of concessions.

*. WTO law originates in legal arrangements that evolved under the General Agreement on Tariffs and Trade of 1947 (GATT).⁴⁰ The original vision underlying GATT was one of equal treatment. GATT members agreed to bind their tariffs at individually “bound” levels under GATT Art. II, and supplemented this with the Most Favoured Nation (MFN) obligation of GATT Art. I and the National Treatment (NT) obligation of GATT Art. III. MFN treatment requires treatment no less favourable than the “most favoured” trading partner, whereas NT requires treatment no less favourable than that accorded to domestic producers.

*. The transition from GATT to the WTO Agreement in 1994 involved an expansion of coverage to cover trade in services and intellectual property. Although new areas of coverage introduced some new interpretative challenges, the impulse to equality in the expanded treaty remains strong.⁴¹ Various GATT and WTO disputes have also emphasized the way that equality remains a major premise of the law. It is all-pervasive, acting as a kind of ‘default’ to which the law automatically recurses in cases of uncertainty.⁴²

*. The commitment to equality may explain why overt references to fairness in the treaty text remain comparatively rare. For instance, in the preamble of the WTO Import Licencing Agreement (ILA) mention is made of “the *fair* and equitable application and administration” of import licencing procedures, procedures that take normally place in the context of a particular encounter between an importer and a national customs administration. Here the possibility for abusive, and hence unfair,

⁴⁰ *General Agreement on Tariffs and Trade*, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194; for the text of the WTO Agreement see 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

⁴¹ Some equality-related terms have been carried over. See for instance GATS Arts. II:1 (MFN), Art. XVII (NT), TRIPS Arts. 3 (NT), 4 (MFN). In other instances, there has been a recognition that the non-quantitative and ever-more instrumental aspects of the new disciplines would require novel concepts, hence the development of “market access” language in relation to both goods and services, “equivalence” and “mutual recognition” in the field of technical barriers, and “harmonization” in relation to sanitary disciplines. ‘Market access’ in the case of goods means the conditions, tariffs and non-tariff measures agreed by members for the entry of specific goods into their markets. In the case of services it takes on the character of a specific provision, GATS Art. XVI, due to the fact that countries are allowed to condition their service commitments. It may be made subject to various types of limitations enumerated in Article XVI(2). For example, limitations may be imposed on the number of services suppliers, service operations or employees in the sector; the value of transactions; the legal form of the service supplier; or the participation of foreign capital. The obligation of ‘equivalence’ is provided in TBT Art. 2.7 and requires WTO members to give “positive consideration to accepting as equivalent technical regulations of other Members”. ‘Mutual recognition’ is referred to in TBT Art. 6.3, which strongly encourages members to enter into negotiations with other WTO members to mutually accept conformity assessment results. Finally, ‘harmonization’, referred to in SPS Art. 3, is the obligation to establish national sanitary and phytosanitary measures consistent with international norms.

⁴² See for instance *EC – Tariff Preferences*, WT/DS246/AB/R (7 Apr. 2004). In that case the issue was whether or not the European Communities could extend certain benefits to some developing country WTO members but not others. This was in apparent violation of the MFN clause. The WTO Appellate Body repeated that “the MFN principle embodied in Article I:1 is a “cornerstone of the GATT” and “one of the pillars of the WTO trading system” but it also observed that “[i]t is simply unrealistic to assume that ... development will be in lockstep for all developing countries at once ...”. (Ibid., para. 160) Consequently, the Appellate Body determined that the Enabling Clause, which allows more favourable treatment in certain instances, permits “preference-granting countries to “respond positively” to “needs” that are not necessarily common or shared by all developing countries.” (Ibid., para. 162) At the same time, however, the Appellate Body appeared to restate the non-discrimination standard by indicating that any preferences “be “generalized and “non-reciprocal.” (Ibid., para. 148). See also *EC – Bananas (21.5)*, WT/DS27/RW/USA, para. 7.712 (19 May 2008) (“... allocation [of a tariff quota] to Members not having a substantial interest *must be subject to the basic principle of non-discrimination*. When this principle of non-discrimination is applied to the allocation of tariff quota shares to Members not having a substantial interest, it is clear that a Member cannot, whether by agreement or by assignment, allocate tariff quota shares to some Members not having a substantial interest while not allocating shares to other Members who likewise do not have a substantial interest.”); *EC – Poultry*, WT/DS69/R, para. 213 (12 March 1998); WT/DS69/AB/R, para. 100 (13 July 1998).

conduct is evident. The ILA attempts to limit this sort of behaviour by requiring governments to publish sufficient information for traders so that they can know how and why import licences are granted. ILA Art. 1(3) also provides that “rules for import licencing procedures shall be neutral in application and administered in a *fair* and equitable manner.”

*. Similarly, the preamble of the WTO Agreement on Agriculture (AA) recalls a long-term objective of international negotiations in the field of agriculture being “to establish a *fair* and market-oriented agricultural trading system”. This particular reference has to be understood in light of perceived inequity in the existing global framework for agriculture in which developed countries continue to subsidize production and suppress developing country export opportunities.⁴³ Again, it is important to note how the issue of fairness pits developing countries against developed ones and the particularities of this relationship.

*. Despite the treaty’s emphasis on non-discrimination generally, there are a number of instances in GATT/WTO law where the idealism of equality yields to disciplines that take account of fairness concerns. The original GATT included provisions on anti-dumping (Art. VI), countervailing duties (Arts. VI and XVI) and safeguards (Art. XIX) which have now been carried over and enhanced in the WTO Agreement.

*. The key to understanding these “flexibilities” and their link with fairness is that they involve a right to depart in some way from the equality-oriented obligations contained in the treaty. Countries would be less willing to participate in a trading arrangement that obliged countries to admit dumped or subsidized goods. To do so would be, in some sense, unfair. At the same time, a number of commentators have therefore recognized the way that these rights serve as “outs” in particular circumstances, and how in doing so, they serve to build support for trade liberalization by assuring limited “safe harbours” for affected interests.⁴⁴ In this way, the larger project of “free” trade is able to proceed.

*. These “rules” disciplines are important to the understanding of fairness in WTO because they are where the “individuality of the law” is highlighted. A country’s right to take action tends to put an accent on whether its actions were “appropriate” in particular circumstances, hence fair. For example, Art. 2.4 of the WTO Anti-Dumping Agreement (ADA) provides that in calculating the margin of dumping “[a] *fair* comparison shall be made between the export price and the normal value.” In *EC – Bed Linen* a WTO panel had the opportunity to expand on comparability in light of the obligation of fairness as follows:

... Read in light of the obligation in the Article 2.4 to make a *fair* comparison, the specific requirements to make comparisons at the same level of trade and at as nearly as possible at the same time, and the obligation to make due allowance for differences affecting price comparability, the use of the word comparable in Article 2.4.2 indicates to us that investigating authorities may insure comparability either by making necessary adjustments under Article 2.4, or by making comparisons for models which are, themselves, comparable.⁴⁵

The panel’s reference to a comparison “at the same level of trade and at as nearly as possible at the same time” speaks to the circumstantial nature of a “fair” assessment. In essence, the treaty requires

⁴³ Martin Khor of the Third World Network has observed, “[the WTO Agreement on Agriculture] is imbalanced in many ways. It has been fashioned in such a way as to enable developed countries to continue high levels of protection, whilst many developing countries have liberalised and their farmers are facing severe and often damaging competition, often from imports artificially cheapened through subsidies.” See Martin Khor, “The WTO Agriculture Agreement: Features, Effects, Negotiations and What is at Stake” 1 (n.d.).

⁴⁴ For description of the way in which built-flexibility has been critical to the survival of GATT and the WTO Agreement see J.H. Jackson, *World Trade and the Law of GATT* 30 (1969); J.H. Jackson, *The Jurisprudence of GATT and the WTO* 189 (2000); A.F. Lowenfeld, *International Economic Law* 41, 42 (2002).

⁴⁵ *EC – Bed Linen*, WT/DS141/R, para. 6.117 (Oct. 30, 2000) [emphasis added].

the comparison must be tailored to circumstances as close as reasonably possible to original conditions in the country of production. However, identity is apparently not required. Because the EC had not done so fully, it was found to have breached its obligation in *EC – Bed Linen*.

*. Similar comments about fairness were made in *Egypt – Rebar*. In that case the panel highlighted the relationalism inherent in the context of an anti-dumping determination, noting that adjustments made in pricing for the purposes of a “fair comparison” are “something of a *dialogue* between interested parties and the investigating authority”.⁴⁶ The panel went on to emphasize the individualized nature of a “fair comparison” by observing that such a comparison “must be done *on a case-by-case basis, grounded in factual evidence*”.⁴⁷

*. The individuality of fairness has also been in issue in several recent cases, notably concerning how particular, and hence fair, a national authority can be in choosing comparable evidence. Debate has raged in WTO law over the permissibility of “zeroing”, that is, the practice of omitting certain positive values in anti-dumping investigations and thereby potentially inflating the final anti-dumping margin. In *U.S. – Orange Juice*, for instance, the panel observed that “the meaning of the notion of “fairness” as it is articulated in (ADA) Article 2.4 will depend upon the particular context in which it is intended to operate.” The panel concluded:

... a comparison methodology (such as “simple zeroing”) that ignores transactions, which if properly taken into account, would result in a lower margin of dumping, must be considered “*unfair*” and therefore inconsistent with Article 2.4.⁴⁸

*. Panels have also described the idea of fairness as “appropriateness”. In *Egypt – Rebar*, for instance, the panel concluded that:

In short, Article 2.4 in its entirety, including its burden of proof requirement, has to do with ensuring a *fair* comparison, through various adjustments as *appropriate*, of export price and normal value.⁴⁹

*. Likewise in *China – Raw Materials*, the panel also appeared to equate fairness with appropriateness, as follows:

It is not “*fair*”, “*equitable*”, “*just*”, “*legitimate*” or “*appropriate* for the circumstances” that exporter applicants may well be subject to different interpretations of whether or not they have sufficient operation capacity to qualify for the zinc quota depending on where they are located.⁵⁰

⁴⁶ *Egypt – Rebar*, WT/DS211/R, para. 7.352 (8 Aug. 2002) [emphasis added].

⁴⁷ *Egypt – Rebar*, *ibid.* See also *U.S. – Aircraft*, WT/DS353/AB/R, para. 1140 (12 March 2012) (“one aspect of ensuring that the proceedings are *fairly* conducted is that each party must be entitled to know the case that it has to make or to answer and must be afforded a *fair* and reasonable opportunity to do so. In general, panels are best situated to determine how this should be accomplished in the particular circumstances of each case ...”) [emphasis added].

⁴⁸ *U.S. – Orange Juice*, WT/DS382/R, para. 7.153 (25 March 2011) [emphasis added]. For a dissenting view see *ibid.*, para. 7.143. See also *U.S. – Shrimp from Vietnam*, WT/DS404/R, para. 7.95 (11 July 2011).

⁴⁹ *Egypt – Rebar*, WT/DS211/R, para. 7.335 (8 Aug. 2002) [emphasis added].

⁵⁰ *China – Raw Materials*, WT/DS394/R, para. 7.743 (5 July 2011) [emphasis added]. See also *United States – “Zeroing”*, WT/DS294/R, para. 9.45 (31 Oct. 2005) (“As to the “discernible standard of *appropriateness* or rightness within the four corners of the agreement which would provide a basis for reliably judging that there has been an unfair departure from the standard” of *fairness*, I am convinced that there at least four, either specifically related to the comparison exercise or more general in nature, permeating the entire *AD Agreement*, but also relevant in the context of price comparisons.”) [emphasis added]. For definitions of “appropriateness” see *U.S. – FSC*, WT/DS108/ARB, para. 5.9 (30 Aug. 2002) (“The ordinary dictionary meaning of the term “appropriate” refers to something which is “especially suitable or fitting”). The panel report in *U.S. – Clove Cigarettes*, WT/DS406/R, n. 849 (2 Sept. 2011) noted that “[t]he word “appropriate” has been interpreted in a number of prior panel reports, including but not limited to the following: Panel Report, *Mexico – Telecoms*, paras. 7.265, 7.367-7.368; Panel Report, *EC – Tube or Pipe Fittings*, paras. 7.240-7.241; Panel Report, *Argentina – Poultry Anti-Dumping Duties*, paras. 7.191 and 7.365; Panel Report, *EC – Sardines*, para. 7.116; Panel Report, *U.S. – Steel Plate*, para. 7.72; Panel Report, *Australia – Salmon*, paras. 8.57 and 8.71.”

*. These many references to fairness appear to emphasize several key things. First, as mentioned, fairness appears to be at issue most often in the context of specific relationships. It is not something that is associated with the general. Second, linked to the first point is the theme of appropriateness. Fairness appears to be in issue when it is necessary to tailor the law to discrete circumstances. Third, fairness involves approximate equality, not identity. The departure it countenances indicates some distancing from the ideal. In this respect, it may be regarded as an expression of the ‘real’.

*. Fairness issues also arise regularly in considerations of due process under WTO law. Here, as in the case of the rules disciplines, the “individuality of the law” and appropriateness are highlighted since due process is likely to involve something of importance to a particular interest.⁵¹ The WTO Appellate Body has referred to due process as “an obligation inherent in the WTO dispute settlement system”⁵² and as “fundamental to ensuring a *fair* and orderly conduct of dispute settlement.”⁵³ In *Australia – Apples* a panel observed that:

Due process ensures a *fair* hearing for the parties to a dispute, through an adequate opportunity to submit claims, arguments and evidence and to respond to the claims, arguments and evidence presented by the other party.⁵⁴

In that case the panel also highlighted the way that the fairness considerations of due process reinforce equality:

Thus, due process also ensures procedural *equality* between the parties by “guarantee[ing] that the proceedings are conducted with *fairness* and impartiality, and that one party is not *unfairly* disadvantaged with respect to other parties in a dispute.”⁵⁵

⁵¹ There is an analogous body of jurisprudence in English law and the law of other common law jurisdictions concerning the “duty of fairness” in administrative proceedings: see William Wade & Christopher Forsyth, *Administrative Law* (10th ed.) 402 (2009); David Jones & Anne S. de Villars, *Principles of Administrative Law* (5th ed.) 253 (2009). This body can help to inform and supplement the theory put forward above given that what fundamentally is at issue as in many cases of fairness in international economic law is the relationship between government and the individual. In the domestic context courts have held that administrative tribunals and bodies owe a duty to be fair – usually conceived of as a duty to take into account the specific circumstances of the applicant – whenever the applicant’s rights are specially affected. The duty can be thought of as an individualization of the procedure to the applicant, or in other words, an obligation of “appropriateness”. The Supreme Court of Canada observed in *Baker v. Canada* that:

[t]he values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their *rights, interests, or privileges* made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

[1999] 2 S.C.R. 817, para. 28. For comment see Grant Huscroft, “From Natural Justice to Fairness – Thresholds, Content and the Role of Judicial Review” manuscript available at www.ssrn.com, abstract 2013253 (May 24, 2012), forthcoming in Colleen Flood et al. *Administrative Law in Context* (2nd ed.). Again, the reference to “rights, interests or privileges” and the insistence on particularization is especially notable. The passage from *Baker* speaks of a desire to tailor procedures and outcomes to the specific rights in question, thereby affirming the relationship between the state and the claimant. It also speaks to the point that law, which is largely instrumental, is best equipped to achieve procedural as opposed to substantive fairness. The same point has been made by other commentators who have referred to similar fairness principles developed in the context of European and EU administrative law. See for instance Stephan W. Schill, “Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law”, IILJ Working Paper 2006/6. Schill observes that “the rule of law understanding underlying the jurisprudence of investment tribunals can be described as primarily procedural and institutional in nature.” *Ibid.*, p. 43. Schill also makes the point that jurisprudence of the European Court of Human Rights or under the European Convention on Human Rights “could ... be used to further concretize fair and equitable treatment, for example, with respect to the timely administration of justice or the right to a fair trial. Similarly, comparative recourse could be had to the emerging principles of European administrative law or the jurisprudence of the WTO Appellate Body in order to further develop the rule of law requirements with respect to the exercise of public power.” *Ibid.*, p. 34.

⁵² *Chile – Price Band System*, WT/DS207/AB/R, para. 176 (23 Sept. 2002).

⁵³ *Thailand – H-Beams*, WT/DS122/AB/R, para. 88. See also *Canada – Continued Suspension*, WT/DS321/AB/R, para. 433 (16 Oct. 2008).

⁵⁴ *Australia – Apples*, WT/DS367/R, para. 7.7 (9 Aug. 2010) [emphasis added].

⁵⁵ *Australia – Apples*, *ibid.* [emphasis added], citing *Canada – Continued Suspension*, WT/DS321/AB/R, para. 433 (16 Oct. 2008). Similarly, in *Chile – Price Band System* the Appellate Body observed that “[a] panel will fail in the duty to respect due process if it makes a finding on a matter that is not before it, because it will thereby fail to accord to a party a *fair* right of response.” *Chile – Price Band System*, WT/DS207/AB/R, para. 176 (23 Sept. 2002). In *Canada – Continued Suspension* the Appellate Body also observed that

*. Another related set of flexibilities that raise fairness considerations in WTO law involve formal exceptions. Every legal system must have exceptions that allow for selective release from generalized rules. In the case of GATT, for instance, these are found most notably in GATT Art. XX, where countries have the right to depart from liberalization requirements in the pursuit of certain defined policy objectives. The applicable method of justification is two-fold. First, a country must prove that it has met the terms of the relevant exception. Second, it must subsequently prove that it has met the terms of GATT Art. XX's preamble, which the Appellate Body has emphasized focuses attention on the *application* of the measure at issue. The analysis centers on whether there is adequate justification for the measure when compared with other, similar situations.

*. Not surprisingly, the invocation of exceptions has led to rigorous analysis of their extent in WTO jurisprudence. A number of cases and commentators have pointed out that exceptional behaviour in the form of rights must not be allowed to vitiate the rights of other WTO members. Consequently, there have been a number of references in case law to doctrines such as abuse of rights, proportionality and estoppel that suggest a preoccupation in these instances with definition, conditioning and limitation.⁵⁶ The preoccupation stems directly from the exceptions which, while required to respect state sovereignty and to tailor the law to individual circumstances in the manner of "fairness", are not unrestricted. For instance, in interpreting the word "necessary" in GATT Art. XX(b) the panel in *Brazil – Tyres* observed:

The necessity of a measure should be determined through 'a process of weighing and balancing of factors' which usually includes the assessment of the following three factors: the relative importance of interests or values furthered by the challenged measures, the contribution of the measure to the realization of the ends pursued by it and the restrictive impact of the measure on international commerce.⁵⁷

*. A further consideration of substantive fairness arises in cases of WTO retaliation where member countries are entitled to retaliate against other countries' breaches of the WTO Agreement. On the surface the law appears to mandate an equality standard. Thus, Art. 22.4 of the WTO Dispute Settlement Understanding (DSU) provides that:

The level of the suspension of concessions or other obligations *shall be equivalent* to the level of the nullification or impairment.

Thus, for instance, in the *Bananas* dispute between the U.S. and EU, the U.S. was authorized to retaliate against the EU in the amount of \$201.6 million annually to counter EC tariff restrictions on foreign bananas. The U.S. implemented retaliation in the form of additional duties on a range of EU agricultural products in the period 2000-09 until the dispute was finally settled. Such retaliation is temporary and to be invoked "as a last resort".⁵⁸

the allocation of the burden of proof in compliance proceedings was, among other considerations, a matter of "procedural fairness". *Canada – Continued Suspension*, *ibid.*, at para. 361 [emphasis added]. And in *Chile – Price Band System* the arbitrator assessing the reasonable period of time (RPT) for implementation by Chile noted that the RPT chosen "will fairly balance the legitimate needs of the implementing Member against those of the complaining Member." *Chile – Price Band System* (21.3), WT/DS207/13, para. 37 (17 Mar. 2003) [emphasis added]. See also TRIPS Art. 42, entitled "*Fair and Equitable Procedures*", which also speaks to the importance of fairness in national administrative proceedings, and comments in *U.S. – Section 211*, WT/DS176/AB/R, paras. 217, 221 (2 Jan. 2002).

⁵⁶ For instance, in *U.S. – Shrimp* the Appellate Body observed in relation to the preamble, or chapeau, of Art. XX that "The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the *right* of a Member to invoke an exception under Article XX and the *rights of the other Members* under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement." *U.S. – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, para. 159 (12 Oct. 1998) (emphasis added).

⁵⁷ *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, para. 7.104 (12 June 2007).

⁵⁸ See DSU Art. 3.7 ("The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements ...").

*. Several commentators have pointed out, however, the opacity of the retaliatory equivalence standard.⁵⁹ What exactly is “*equivalent* to the level of the nullification or impairment” and how is it to be implemented? It might seem reasonable to assume that nullification or impairment should be tied to the detrimental trade *effects* of a violation, but even this initial issue is unclear given that the MFN obligation infers that a single violation may have multi-directional effects within the trading system. Thomas Sebastian has noted that there are potentially four issues arising in an equivalence determination:

Arbitrators have to (1) specify the baseline from which they wish to assess the detrimental effects of the concerned measures; (2) settle on a metric for measuring these effects; (3) determine which detrimental effects will be considered; and (4) resolve any empirical issues that may arise.⁶⁰

Sebastian and others have detailed the arbitrary nature of all of these inquiries and the fact that, taken together, the aggregate assessment of them is conceptually unconvincing.

*. Perhaps the greatest complaint of the retaliatory standard is the fact of its limited intensity. Many commentators have observed that a strict equivalence standard for retaliation provides no real incentive to comply. Sebastian concludes with palpable frustration that:

The search for an instrumental rationale to guide arbitrators leads us to conclude that many theories cannot be reconciled with the structure of the remedial provisions of the DSU, are not achievable in practice, or are simply incoherent. ... It follows that, unless one endorses the retribution rationale, one must conclude that the bulk of the WTO remedial regime relating to the permissible intensity of retaliation is simply bereft of any valid rationale.⁶¹

*. Nevertheless, it is useful to consider exactly why an equivalence standard might make sense on the theory put forward in this article and how the conclusions of Sebastian and others can be reformulated so as to be more logically and naturally understood as instances of “fairness”.

*. My conclusion would appear to be nonsensical if considered in light of the treaty’s plain directive, contained in DSU Art. 22.4, that the amount of retaliation should be “*equivalent* to the level of the nullification or impairment”. But it *is* intelligible if seen against a broader background of the treaty - a background composed of all the transactions within series of trading relationships *taken together*. Shortfalls in the assessment of nullification or impairment routinely occur because WTO members expect their relationships to continue and are therefore content to contemplate such a result. Like private actors in any ‘community’, WTO members will be content to accept permission to retaliate for somewhat *less or more* than the damage they have sustained in recognition of an ongoing relationship requiring reciprocation in future. The equality language contained in the DSU is valuable, however, because it gives the system a touchstone to *aim* for. In this sense, the aspiration to equality is important for the promotion of community *even if* it is never fully nor satisfactorily realized.⁶²

⁵⁹ See for instance Thomas Sebastian, “World Trade Organization Remedies and the Assessment of Proportionality: Equivalence and Appropriateness” 48:2 *Harvard Int’l L.J.* 337 (2007) [hereinafter ‘Sebastian’]; Bryan Mercurio, “Retaliatory Trade Measures in the WTO Dispute Settlement Understanding: Are there Really Alternatives?” in James C. Hartigan (ed.), *Frontiers of Economics and Globalization - Vol. 6*, 397 (2009) [hereinafter ‘Mercurio’].

⁶⁰ Sebastian, *ibid.*, p. 351.

⁶¹ Sebastian, *ibid.*, pp. 378-379.

⁶² Such considerations are perhaps even more apparent in the realm of WTO disciplines on subsidies. The WTO Subsidies Agreement (SCM) Art. 3 allows countries to complain against export subsidies, that is, subsidies which are conditioned on exports or on schemes of import substitution. In the event that a violation is found, SCM Art. 4.10 provides that the WTO “shall grant authorization to the complaining Member to take *appropriate* countermeasures” An accompanying footnote explains that the term “appropriate” “... is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.” The standard of “appropriateness” is evidently different from the equivalence standard found in DSU Art. 22.4. In three

*. These illustrations of the tension between equality as an abstract ideal and the determination of what is fair in specific circumstances should also help to clarify the definition of fairness. Fairness is a particular value. It highlights “the individuality of the law”, whether this is manifested in specific relations, in the invocations of exceptions, or in the assessment of retaliation. In each instance, what is required by the law can be understood as what is “appropriate” to maintain the trading community.

4. Some Concluding Thoughts

*. I have attempted in this article to put forward a definition of fairness and offer an explanation for its recurrent importance in law and WTO law that goes beyond existing literature. In short, I have suggested that fairness is synonymous with “appropriateness”.

*. In WTO law the issue of fairness is most closely associated with appropriate treatment, which again, I have suggested is undertaken to preserve and strengthen relationships. This view coheres with humans’ biologic and evolutionary nature, which depends upon relationships to accomplish the increasingly complex tasks that sustain human life. The tremendously sophisticated networks of production and consumption that have arisen over the last few decades in the form of global supply and value chains tend to bear my point out.

*. The definition of fairness as “appropriateness” offers a number of advantages. For one, we no longer have to resign ourselves to the fact that “talk about fairness is conceptually muddled.”⁶³ Rather, we can be much clearer about what fairness involves and more aware of its ultimate function as a tool of communal cohesion. It is also possible to understand why, for instance, recent protests about the unfairness of existing economic arrangements may have taken place in many countries against a background of uneven economic growth and increasing economic disparity. What is happening in many places is an erosion of community.

*. Fairness considerations are most evident in the law of rights because it is rights-oriented situations that most often express “the individuality of the law”.⁶⁴ Individuality is manifested differently in different fields of international economic law and ultimately depends upon the overall ‘orientation’, or ‘pitch’, of a particular legal system.

*. In WTO law the law is obligation-oriented and generalized, being keyed in most instances to equality-based obligations. Hence, the “individuality of the law” is obscured. Nevertheless, attention to individualism arises in preambular references to fairness in the WTO Agreements and in particular WTO rules concerned with fair conduct. This stands in sharp contrast to other areas of international economic law, such as international investment law, where the legal system concentrates its attention on the protection of individual investors and their investments. Not surprisingly within that matrix, claims to ‘fair and equitable treatment’ are of increasing frequency and may, in fact, be one reason

instances arbitrators assessing retaliation under DSU Art. 22.6 have considered this difference in determining what is “appropriate”. Thus, in *Brazil – Aircraft (Article 22.6)* the arbitrators observed that the difference did not require an equality-of-harm approach as is normally the case under DSU Art. 22.4 and instead decided that “a countermeasure is appropriate *inter alia* if it effectively induces compliance.” WT/DS46/ARB, para. 3.44 (Aug. 28, 2000). In *U.S. – FSC (Article 22.6)* the issue was tax credits received by U.S. firms for certain overseas operations, something that was found to amount to an export subsidy. Because there was no easy way of calculating the exact benefit conferred on U.S. companies, the arbitrators determined that “appropriate” involved the “imposition on firms of the Member concerned of expenses at least equivalent to those initially incurred by the treasury of the Member concerned in granting benefits to its firms.” *U.S. – FSC*, WT/DS108/ARB (Aug. 30, 2002). Finally, in *Canada – Aircraft (Article 22.6)* the arbitrators noted that the complainant, Brazil, had failed to substantiate a causal link between the subsidy and the sales lost by a Brazilian manufacturer so that the typical equality-of-harm approach could not be usefully applied. In the alternative, the arbitrator decided to base “appropriate countermeasures” on the amount of the subsidy conferred, but also added a 20 percent top-up, or premium, to this amount in recognition of the fact that Canada has made clear its refusal to withdraw the subsidy. It is noteworthy that in coming to their specific conclusion, the arbitrators took into account a number of factors that had the effect of further particularizing the relief. See *Canada – Aircraft (II)*, WT/DS222/ARB, para. 3.121 (Feb. 17, 2003). The “individuality of the law” here is apparent.

⁶³ Mathias Risse, “Fairness in Trade” 2 (Working Paper, Feb. 5, 2005).

⁶⁴ Philip Allott, *Eunomia* p. 159-160 (¶ 10.43) (1990).

why other commentators have often complained about the fragmentary nature of the law is in this field and how it fails to display principled coherence.⁶⁵ This may be comprehended as simply a by-product of the subjectivity of fairness.

*. From the above analysis it becomes possible to represent a theory of fairness within a larger theory of justice, as follows:

$$\text{Justice} = \text{Equality} + \text{Fairness}$$

*. However, as we have also seen, this basic relationship is accompanied by a series of provisos:

(1) Equality > Fairness

(2) Equality ≠ Fairness

(3) Equality ≠ Identity

*. Rules of international economic law reveal a preoccupation with fairness that is roughly consistent with the theoretical view put forward above. Fairness involves “the justice of particular situations”. It is therefore no surprise that particular relationships between economic actors (e.g. the WTO membership), between specific countries (e.g. the U.S. and China), between groups of countries (e.g. developing and developed) or between institutions and litigants (e.g. investment tribunals and claimants) should raise fairness claims in international economic law. It is here that the “individuality of the law” is most clearly and forcefully apparent.

*. I have labelled fairness in this article ‘appropriateness’, or “the justice of the particular”. In closing it bears thinking about this definition in connection with the Occupy Movement mentioned in passing at the outset. As mentioned, Occupy’s chief claim is with respect to the fairness (or unfairness) of existing social arrangements in many countries, and in particular, growing income inequality. In this connection, we can ask how a “justice of *the particular*” can be applied to a condition of growing income disparity that is *society-wide*. Isn’t this, in some sense, a mismatch?

*. To answer this question it is important to remember that fairness is a property of relationships. The idea that motivates so much concern today, and that has sparked protests under the banner of Occupy, involves the relationship of individuals to the community at large. Since the Second World War this relationship has been conceived of as one which allows, if not promises, a degree of social mobility from one generation to the next. That promise is now under threat in many countries as a majority of individuals and families find themselves stagnating in terms of opportunities while a small minority advance. This is where the idea of fairness resonates. What is ‘appropriate’ is being challenged, with the attendant challenge that this presents to the basic framework of human relations underlying society, or ‘community’.

*. A metaphoric description to what is happening might be that fairness is characteristic of parts of a whole, rather than the whole itself. In this sense, the examination above tends to confirm the observation made earlier that fairness would probably make a poor rule for human behaviour in every instance. Our behaviour has adapted to this imperative by evolving towards equality, which remains an aspirational and largely unfinished project in *any* human community.

*. During the U.S. Civil War Abraham Lincoln recognized this very point when he attempted to reconcile references that “all men are created equal” in the U.S. Declaration of Independence with the

⁶⁵ “[M]any critical voices have deplored the lack of predictability and balance of investment arbitration ...” August Reinisch, “The Future of Investment Arbitration” in Christina Binder et al. (eds), *International Investment Law for the 21st Century*, 894 at 916 (2009).

actual state of race relations at that time. One of Lincoln's biographers has observed:

When the authors of the Declaration spoke of equality, Lincoln insisted, "they did not mean to assert the obvious untruth, that all were then actually enjoying that equality. They meant to set up a standard maxim for free society, which should be familiar to all, revered by all; constantly looked to, constantly laboured for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colours everywhere."⁶⁶

Lincoln's response emphasizes the way in which equality is generalized and immanent, yet always incomplete and unfinished. In this respect, it is something that a sustainable community is constantly working *towards*. Equality will form the basis of the community's political affiliation, but beyond that, it is inequality, with its attendant considerations of fairness, that binds people and countries together.⁶⁷

⁶⁶ Doris Kearns Goodwin, *Team of Rivals* 207 (2005).

⁶⁷ A polis "is composed of unlike elements," that is to say, of individuals who have many different relations to one another – as man and wife, parent and child, soldier and civilian, ruler and ruled – and who engage in many different occupations, "which enables them to serve as complements to one another, and to attain a higher and better life by the mutual exchange of their different services." There cannot then "be a single excellence common to all the citizens, any more than there can be a single excellence common to the leader of a dramatic chorus and his assistants ... It is as if you were to turn harmony into mere unison, or to reduce a theme to a single beat." Shirley Robin Letwin, *On the History of the Ideal of Law* (Noel B. Reynolds ed.) 22 (2005).